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No. 91-1798

In the Supreme Court of the United States

OCTOBER TERM, 1992

VILLAGE OF LOS RANCHOS DE ALBUQUERQUE, ET AL.,
PETITIONERS

v.

MICHAEL P. W. STONE, SECRETARY OF THE ARMY,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Administrative Procedure Act's "arbitrary and capricious" standard, 5 U.S.C. 706(2)(A), governs review of a federal agency's decision not to prepare an environmental impact statement pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 8a-18a, is unreported, but the judgment is noted at 947 F.2d 955 (Table). The court of appeals' supplemental order on petition for rehearing and suggestion of rehearing en banc, Pet. App. 1a-7a, is reported at 956 F.2d 970. The decisions of the district court, Pet. App. 19a-87a, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1991. The petition for rehearing was denied

on February 11, 1992. Pet. App. 1a-3a. The petition for a writ of certiorari was filed on May 11, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Under Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C), when a federal agency engages in "major Federal actions significantly affecting the quality of the human environment," it must prepare an environmental impact statement (EIS) concerning each such action. This case arises from a determination by the U.S. Army Corps of Engineers (the Corps) that granting the City of Albuquerque, New Mexico (the City), a permit under the Clean Water Act, 33 U.S.C. 1344(a), to build a bridge across the Rio Grande River will not have a significant impact on the human environment.

1. In 1965, consultants prepared a transportation study proposing several new river crossings to connect the eastern and western portions of the City. Pet. App. 31a; Gov't C.A. Br. 6. In 1980, the Urban Transportation Planning Policy Board of the Middle Rio Grande Council of Governments determined that the preferred alternatives consisted of a four-lane bridge at the Paseo del Norte site and a two-lane bridge at the Montano Road site. In 1980, the New Mexico State Highway Department, with the assistance of the Federal Highway Administration (FHWA), prepared a full-scale environmental impact statement for the project. The record of decision approving the final EIS was issued in January 1984.[1] In 1983 and 1985, the voters approved bond

[1] The sufficiency of that EIS was challenged in *Village of Los Ranchos de Albuquerque* v. *Barnhart*, 906 F.2d 1477 (10th Cir. 1990), cert. denied, 111 S. Ct. 1017 (1991). The court of appeals, however, held that the construction of the Montano Bridge as such

obligations that the City earmarked for the construction of the Montano Bridge. Pet. App. 31a-32a; Gov't C.A. Br. 6-7.

In 1986, the City applied to the Army Corps of Engineers for a permit under the Clean Water Act, 33 U.S.C. 1344(a), authorizing temporary placement of fill material in the river during construction of the Montano Bridge. To determine whether the issuance of the permit would "significantly affect[] the quality of the human environment" under NEPA, 42 U.S.C 4332(2)(C), the Corps prepared an environmental assessment (EA).[2] After soliciting public comments, conducting a public hearing, and obtaining an independent evaluation of the Montano Bridge project, the Corps issued a "finding of no significant impact," 40 C.F.R. 1508.13, supported by an EA. The Corps accordingly declined to prepare an EIS, and it issued the City a Clean Water Act permit on July 6, 1987, with special conditions to mitigate environmental impacts. Pet. App. 31a-32a; Gov't C.A. Br. 7-8.

2. On August 29, 1988, petitioners filed this action in the District Court for the District of New Mexico, alleging, *inter alia*, that the Corps violated NEPA by not

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is not a "major Federal action" requiring compliance with NEPA. The court rejected claims that the construction was a "federal action" because (1) the project was eligible for federal assistance; (2) the FHWA had helped prepare and approved the EIS; and (3) the project was improperly segmented from another project that was a major federal action. 906 F.2d at 1480-1484. This case, by contrast, involves the Army Corps of Engineers' issuance of a permit under the Clean Water Act, 33 U.S.C. 1344(a), and we do not contest that the issuance of such a permit is a federal action.

[2] An environmental assessment is a concise public document that contains sufficient information to determine whether to prepare an EIS or make a finding of no significant impact. See 40 C.F.R. 1508.9.

preparing an EIS.[3] Following a three-day evidentiary hearing,[4] the district court issued a 39-page order and opinion denying petitioners' motion for a preliminary injunction. Pet. App. 30a-69a; see Gov't C.A. Br. 10. The district court reviewed the Corps' action to determine (1) whether the Corps had taken a "hard look" at the environmental consequences of its action and made a "good faith, objective effort" to comply with NEPA, and (2) whether its decision was adequately supported by the record. Pet. App. 39a. Based on its review of the evidentiary hearing and the administrative record, *id.* at 39a-62a, the court found that the Corps' decision to grant the permit without preparing an EIS was neither "arbitrary and capricious" nor "unreasonable." *Id.* at 62a.[5] On

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[3] Petitioners also named as defendants the City and officials of the Department of the Interior. In addition to their NEPA claim, petitioners alleged violations of the Clean Water Act, 33 U.S.C. 1251 *et seq.*, the Fish and Wildlife Coordination Act, 16 U.S.C. 661 *et seq.*, the National Historic Preservation Act, 16 U.S.C. 470 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* Pet. 4. The only issue before this Court is petitioners' claim that NEPA required the Corps to prepare an EIS before issuing the Clean Water Act permit.

[4] On May 8, 1989, the district court dismissed the claims against the City. Pet. App. 70a-78a. As part of the same order, the court also permitted petitioners to supplement the administrative record with evidence regarding the impact of the project on the fracturing of the bosque (woods) adjacent to the river crossing. Pet. App. 78a-83a.

[5] The district court found that the Corps had adequately considered the effects of the bridge construction on the bosque, the noise and air quality impacts of the project, its secondary land use impacts, the effect of construction on historical resources, and the impact of the construction on a local residential neighborhood. Pet. App. 39a-42a, 44a-47a. Although the court found that the Corps had not adequately considered secondary traffic flows, the court determined that the secondary traffic was not within the Corps' jurisdiction under the Clean Water Act and any error was harmless.

November 30, 1989, the district court granted the federal respondents' motion for summary judgment, reasoning that petitioners had not submitted new evidence since the hearing that would warrant a different result. *Id.* at 20a-25a.[6]

3. The court of appeals affirmed. Pet. App. 8a-18a. Relying on *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360 (1989), the court evaluated the Corps' decision not to prepare an EIS under the APA's "arbitrary and capricious" standard. Pet. App. 12a-13a. In undertaking that evaluation, the court explained, a reviewing court must determine "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* at 12a (quoting *Marsh*, 490 U.S. at 378). Although acknowledging the existence of disputes

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Id. at 42a-44a, 47a-48a, 57a. The court also held that the Corps did not err in refusing to consider the impact of the permit in conjunction with other road improvements because the City was going to undertake those improvements irrespective of the bridge construction. *Id.* at 54a-57a. The court rejected petitioners' claim that the Corps failed to conduct an adequate study of alternatives to the project, because none of petitioners' suggested alternatives was feasible. *Id.* at 48a-51a. Finally, the court held that the Corps had not acted in an arbitrary and capricious manner when it refused to designate the affected area as a wetland, and that the Corps had sufficiently consulted with, and acted on the recommendations of, the Fish and Wildlife Service. *Id.* at 58a-61a.

[6] Petitioners proffered new evidence relating to the "public nuisance" issue; the court determined, however, that consideration of that evidence went beyond the court's order allowing petitioners to supplement the administrative record only with respect to the fracturing of the bosque. Pet. App. 24a. The court noted that in general it is improper to review administrative action based on evidence outside the administrative record. *Ibid.* (citing *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729 (1985), and *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976)).

concerning the project's impact and the availability of alternatives, the court of appeals "agree[d] with the district court that there was ample evidence to affirm the agency's finding of no significant impact for purposes of NEPA under the 'arbitrary or capricious' standard of review." *Id.* at 13a; see *id.* at 13a-15a.

4. On February 11, 1992, the court of appeals granted rehearing en banc, limited to the issue of the appropriate standard of review. Pet. App. 3a-4a. It noted that in *Marsh*, this Court applied the "arbitrary and capricious" standard to an agency's determination not to supplement an existing EIS. Pet. App. 5a. The en banc court found it significant that the Court had emphasized that "[t]he decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance." *Id.* at 5a (quoting *Marsh*, 490 U.S. at 374). Hence, the court of appeals overruled prior circuit precedent applying a "reasonableness" standard of review and affirmed the judgment of the panel based on the "arbitrary and capricious" standard prescribed by this Court in *Marsh*. Pet. App. 6a-7a.

ARGUMENT

Petitioners contend that the court of appeals erred in applying the "arbitrary and capricious" standard in reviewing the Corps' decision not to prepare an environmental impact statement. Pet. 9-26. In *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360 (1989), however, this Court made clear that the "arbitrary and capricious" standard is the proper standard of review of an agency's determination that a federal action will not have a "significant" impact on the environment within the meaning of NEPA. There is no conflict among the circuits regarding the applicability of *Marsh* under the circumstances presented here. Hence, further review is unwarranted.

1. In *Marsh*, this Court considered the proper standard of review of an agency's determination whether the discovery of new information requires preparation of a supplemental EIS. 490 U.S. at 374-377. In identifying the proper standard of judicial review, the Court looked to the Administrative Procedure Act, 5 U.S.C. 706, and concluded that the agency's determination that an EIS should not be supplemented "is controlled by the 'arbitrary and capricious' standard of § 706(2)(A)." See 490 U.S. at 375-376. The Court explicitly rejected the contention that "the determination whether the new information suffices to establish a 'significant' effect is either a question of law or, at a minimum, a question of ultimate fact and, as such, 'deserves no deference' on review." 490 U.S. at 376. Rather, the Court reasoned (*id.* at 376-377):

> The question presented for review in this case is a classic example of a factual dispute the resolution of which implicates substantial agency expertise. [The] claim that the Corps' decision not to file a second supplemental EIS should be set aside primarily rests on the contentions that the new information undermines conclusions contained in the [Final EIS], that the conclusions contained in the * * * memorandum and * * * survey [containing the new information] are accurate, and that the Corps' expert review of the new information was incomplete, inconclusive, or inaccurate. The dispute thus does not turn on the meaning of the term "significant" or on an application of this legal standard to settled facts. Rather, resolution of this dispute involves primarily issues of fact. Because analysis of the relevant documents "requires a high level of technical expertise," we must defer to "the informed discretion of the responsible federal agencies."

Accordingly, the Court in *Marsh* held that "as long as the Corps' decision not to supplement the [Final EIS] was not 'arbitrary and capricious,' it should not be set aside." *Id.* at 377.

Here, the court of appeals, sitting en banc, properly concluded that the reasoning of *Marsh* also governs the proper standard of review of an agency's decision not to prepare an EIS in the first instance. Pet. App. 4a-6a. Petitioners in this case have contested the accuracy, currency, and completeness of the information upon which the Corps relied, as well as the validity of the conclusions that the Corps drew from that information. See Pet.17-25. Their claims are therefore not materially different from the contention in *Marsh* "that the Corps' expert review of the new information was incomplete, inconclusive, or inaccurate," and that the new information was sufficiently "significant" to require a supplemental EIS. See 490 U.S. at 376-377. Indeed, as the Court in *Marsh* emphasized, "the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: If there remains 'major Federal actio[n]' to occur, and if the new information is sufficient to show that the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared." *Id.* at 374 (quoting 42 U.S.C. 4332(2)(C)).

Consistent with the decision in this case, other courts of appeals have abandoned their use of a "reasonableness" standard of review in the aftermath of *Marsh* and applied the "arbitrary and capricious" standard to an agency's finding of no significant impact. See *Sabine River Authority* v. *United States Department of the Interior*, 951 F.2d 669, 677-678 (5th Cir. 1992), petitions for cert. pend-

ing, Nos. 91-1927 & 91-1929;[7] *Goos* v. *ICC*, 911 F.2d 1283, 1292 (8th Cir. 1990);[8] cf. *North Buckhead Civic Ass'n* v. *Skinner*, 903 F.2d 1533, 1538 (11th Cir. 1990) (rejecting prior circuit precedent applying a "reasonableness" standard under NEPA and generally "adopt[ing] the arbitrary and capricious standard when reviewing agency action in NEPA cases"). As the Fifth Circuit observed, *Marsh* governs in the present context because the legal standard for determining the need for a supplemental EIS is "essentially the same as the standard for determining the need for an original EIS." *Sabine*, 951 F.2d at 677 (internal quotation marks omitted). Thus, petitioners are incorrect in asserting (Pet. 14-15) that the "arbitrary and capricious" standard applied in *Marsh* is inapplicable in the circumstances of this case.[9]

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[7] Contrary to petitioners' argument (Pet. 12), *Sabine* makes clear that the Fifth Circuit does not apply a less deferential standard in reviewing an initial, rather than a supplemental, EIS. *Sabine*, 951 F.2d at 677-678.

[8] Although the Eighth Circuit in *Goos* held that *Marsh* does not apply to an agency's determination that an action is not a "major Federal action" subject to NEPA, the court made clear that where, as here, an agency "has * * * prepared an EA and issues a finding of no significant impact, a reviewing court reviews that determination under the arbitrary and capricious standard." *Goos*, 911 F.2d at 1292.

[9] Petitioners also claim (Pet. 16) that on a motion for summary judgment, the district court should have resolved all disputed facts in favor of petitioners rather than deferring to the agency. That contention, however, misapprehends the role of a reviewing court under the APA. Review of agency action is typically based on the administrative record before the agency, and the reviewing court is generally not charged with making a *de novo* inquiry and reaching its own conclusions about the matters disputed before the agency. *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 743-744 (1985). Rather, the court must determine whether the agency's disposition of the matters before it was arbitrary and capricious. As the district court correctly explained in this case:

2. Despite the clear reasoning of *Marsh*, petitioners rely on court of appeals decisions prior to *Marsh* to support their claim that there is a conflict among the circuits on the proper standard of review. See Pet. 10-14. To be sure, some courts of appeals that had applied a "reasonableness" standard prior to *Marsh* have not had occasion to revisit the standard of review in light of *Marsh*. But petitioners have not cited (and we are unaware of) any court of appeals decision that has considered the question and declined to apply *Marsh* to an agency's decision not to prepare an EIS based on a finding of no significant impact. Because there is no conflict among the circuits on the question whether *Marsh* requires application of the APA's "arbitrary and capricious" standard in this context,[10] and because of the

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> The issue before this Court is not whether the plaintiffs can point to one or other conflicting fact or opinion in the record. * * * [T]he record in these types of proceedings will always contain contradictory opinions. Instead, the issue before the Court is whether the record before the administrative agency substantiates that agency's findings.

Pet. App. 23a (citing *Sabin* v. *Butz*, 515 F.2d 1061, 1067 (10th Cir. 1975)).

[10] In addition, even prior to *Marsh*, several circuits had applied the "arbitrary and capricious" standard in reviewing such determinations. See, *e.g.*, *River Road Alliance, Inc.* v. *Corps of Engineers of United States Army*, 764 F.2d 445, 449 (7th Cir. 1985), cert. denied, 475 U.S. 1055 (1986); *Town of Orangetown* v. *Gorsuch*, 718 F.2d 29, 35 (2d Cir. 1983), cert. denied, 465 U.S. 1099 (1984); *Sierra Club* v. *Peterson*, 717 F.2d 1409, 1413 (D.C. Cir. 1983); *Providence Road Community Ass'n* v. *EPA*, 683 F.2d 80, 82 (4th Cir. 1982). Those courts of appeals are in accord with the trend of post-*Marsh* decisions holding that the "arbitrary and capricious" standard defines the scope of review in this context.

clarity with which *Marsh* spoke to that issue, further review is unwarranted.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11] This Court, moreover, has indicated that "the difference between the 'arbitrary and capricious' and 'reasonableness' standards is not of great pragmatic consequence." *Marsh*, 490 U.S. at 377 n.23; accord, *Sabine*, 951 F.2d at 678 n.2; *Sierra Club* v. *Lujan*, 949 F.2d 362, 368 (10th Cir. 1991); *Goos*, 911 F.2d at 1292 n.6. In this case, the district court acknowledged the similarity between the two standards and generally sought to "to assure that, in conducting its investigations or decision-making processes, the agency * * * [made] a reasoned decision based on an evaluation of the relevant factors." Pet. App. 36a. After giving detailed consideration to petitioners' specific claims in light of the administrative record and the evidence submitted at a three-day hearing, *id.* at 39a-62a, the district court was unable to find "that the Corps' decision to grant the permit was either arbitrary and capricious *or* unreasonable." *Id.* at 62a (emphasis added). Thus, contrary to petitioners' fact-bound contentions that the Corps erred in its analysis of particular environmental concerns (see Pet. 17-25), petitioners would not be entitled to relief even if this Court were to embrace a less deferential standard than the one that the court of appeals applied in this case.